Supreme Court, U.S.
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No. 00-

IN THE

Supreme Court of the United States

ROBERT SCOTT FOWLER,

Petitioner,

v.

THE UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

RICHARD ALAN ANDERSON
Of counsel to:
BURLESON, PATE & GIBSON, L.L.P.
Attorney for Petitioner
2414 N. Akard, Suite 700
Dallas, Texas 75201
(214) 871-4900

162123

Counsel Press LLC
(800) 274-3321 • (800) 359-6859

QUESTIONS PRESENTED

Whether a conflict in written opinions by the federal circuits in applying a definition of the term "distribution" as set out in U.S.S.G. § 2G2.2(b)(2) defeats the goals of the sentencing guidelines in that it results in dissimilar sentencing treatment for similar conduct.

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OPINIONS BELOW

Petitioner respectfully Petitions for Writ of Certiorari to review panel opinion of the Fifth Circuit Court of Appeals in this case.

On June 23, 2000, a panel opinion of the United States Court of Appeals for the Fifth Circuit issued an opinion reversing Petitioner's conviction and remanding it to the trial court for re-sentencing concerning a sentencing enhancement for sado masochistic material under U.S.S.G. § 2G2.2(b)(3). In that panel opinion, the Fifth Circuit Court of Appeals affirmed Petitioner's conviction and sentencing enhancement for "distribution" pursuant to Section 2G2.2(b)(2). The Fifth Circuit opinion (Appendix A) is reported at 216 F.3d 459 (5th Cir. 2000).

STATEMENT OF JURISDICTION

The judgment of the Fifth Circuit Court of Appeals was entered June 23, 2000. No motion for rehearing was requested or granted.

The jurisdiction of this court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S.S.G. Sec. 2G2.2 trafficking any material involving the sexual exploitation of a minor.

Sec. 2G2.2(b)(2) . . . "If the offense involved distribution, increase by the number of levels from the table in Sec. 2F1.1 corresponding to the retail value of the material, but in no event less than five levels."

Application Note No. One: "Distribution" includes any act related to distribution for pecuniary gain, including production, transportation, and possession with intent to distribute.

STATEMENT OF THE CASE

Robert Scott Fowler, hereinafter referred to as Petitioner, was indicted in a Five Count Indictment returned by a Grand Jury in the Northern District of Texas, Lubbock Division, on December 8, 1998. Count One charged Petitioner with Travel With Intent to Engage in a Sexual Act With a Minor, in violation of 18 U.S.C.A. § 2423(b). Counts Two through Four alleged Interstate Transportation of Child Pornography, in violation of 18 U.S.C. § 2252(a)(1). Count Five alleged a Criminal Forfeiture pursuant to 18 U.S.C. § 2253.

On April 1, 1999, Robert Scott Fowler entered a plea of guilty to Count Three of the Indictment pursuant to a Plea Agreement. On June 18, 1999, the Court sentenced Petitioner to the custody of the United States Bureau of Prisons for eighty-seven months and imposed a term of supervised release of three years. Petitioner filed Notice of Appeal on June 24, 1999. Petitioner's Plea Bargain Agreement allows Petitioner to appeal from any improper computation of an applicable guideline level.

On June 23, 2000, in a panel opinion, the Court of Appeals, Fifth Circuit, pursuant to *United States v. Canada*,

110 F.3d 260 (5th Cir. 1997) (per curiam), *cert. den.*, __ U.S. __, 118 S. Ct. 195, 139 L. Ed. 2d 133 (1997), affirmed Petitioner's case concerning a sentencing enhancement for distribution pursuant to U.S.S.G. § 2G2.2(b)(2) [Appendix A, page 2]. That same panel reversed and remanded for re-sentencing of Petitioner's sentencing enhancement for material portraying sadistic conduct pursuant to U.S.S.G. § 2G2.2(b)(3). [Appendix A, page 6].

REASONS FOR GRANTING THE WRIT

The issue before this Court arises from divergent and conflicting opinions in the circuit Courts resulting in disparate sentencing for similar conduct.

The term "distribution" as it applies to U.S.S.G. § 2G2.2[1] and its ambiguous definition prejudices defendants charged because of the disparate treatment simply by virtue

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1. The five offense level enhancement was assessed pursuant to U.S.S.G. § 2G2.2(b)(2) which provides: "If the offense involved distribution, increase by the number of levels from the table in § 2F1.1 corresponding to the retail value of the material, but in no event less than five levels." Commentary number 1 to this guideline provides: " 'Distribution' includes any act related to distribution for pecuniary gain, including production, transportation, and possession with intent to distribute." U.S.S.G. § 2F1.1 establishes monetary values in offenses involving fraud or deceit, and assigns those monetary values an appropriate increase in offense level. Despite the fact that this guideline references the retail value of the material in determining the number of levels of enhancement, and the additional fact that the commentary defines "distribution" in terms of any act related to distribution for pecuniary gain, the Circuits of the United States Courts of Appeals have been split on whether this definition of distribution is inclusive or exclusive of acts done for profit.

of the geographic location of the offense. The conflict not only warrants review by this Court, it exemplifies the type of cases considered in U.S. Sup. Ct. Rule 10(a).

In the present case the United States Court of Appeals for the Fifth Circuit affirmed the District Court's assessment of a five level enhancement for "distribution" pursuant to U.S.S.G. § 2G2.2(b)(2). In following their previous decision, in *Canada*, *supra*, the Fifth Circuit Court of Appeals is in direct conflict with the Ninth and Eighth Circuits. The difference is not superficial but rather diametric conflict which may not be resolved without guidance by this Court.

I. FIFTH CIRCUIT

The United States Court of Appeals for the Fifth Circuit addressed the issue of "distribution" in *United States v. Canada*, 110 F.3d 260 (5th Cir. 1997) (per curiam), *cert. den.*, __ U.S. __, 118 S. Ct. 195, 139 L. Ed. 2d 133 (1997). The Defendant in *Canada* was charged with Interstate Transportation With Intent to Engage in Sexual Act With a Minor, Transmission of Child Pornography, and Possession of Child Pornography. The Defendant pled guilty to all counts and the Court enhanced his sentence pursuant to U.S.S.G. § 2G2.2(b)(2). The Court noted that the District Court found that the Defendant had transmitted the pornographic images for the purposes of enticing the 13-year-old minor to have sex with him, and such factual finding of the Court was *not* challenged by the Defendant. The Court further found that there was proof that the Defendant participated in active trading with other individuals of child pornography. This Court found that the application note in which "distribution" was defined as predicated upon pecuniary gain was unambiguous in that the

intended definition of "distribution" for the sake of the guideline was meant to be inclusive of pecuniary gain purposes, but not exclusive of all other purposes. The Court held the evidence in this case sufficient to trigger the enhancement.

In *United States v. Fowler*, 216 F.3d 459 (5th Cir 2000), the instant case, the Petitioner was charged in a Five Count Indictment alleging in Count One Travel With Intent to Engage in a Sexual Act With a Minor in violation of 18 U.S.C. § 2423(b); in Counts Two through Four with Interstate Transportation of Child Pornography in violation of 18 U.S.C. § 2252(a)(1); and in Count Five with Criminal Forfeiture pursuant to 18 U.S.C. § 2253. On April 1, 1999, Petitioner entered a plea of guilty to Count Three of the Indictment pursuant to a Plea Agreement.

The United States Probation Officer, in the Presentence Report, recommended that Petitioner's offense level computation be increased by five levels because the instant offense involved distribution pursuant to U.S.S.G. § 2G2.2(b)(2). Petitioner timely objected to the five level enhancement on the grounds, among others, that there was no evidence of any pecuniary gain, and, that any agreement to cross state lines for the purpose of having sexual relations with a minor was consummated prior to the sending of any images and therefore the sending of an image was not an "enticement" to the minor to engage in sex. The government filed a Sentencing Memorandum setting out their support of the Probation Officer's finding, citing the Fifth Circuit decision in *Canada*, *supra*.[2] The Probation Office

2. Other circuits have defined pecuniary gain as a broad concept that did not exclude the possibility of swaps, barter, in kind transactions, or other valuable considerations. The Seventh Circuit, (Cont'd)

replied to Petitioner's objections in its addendum to the Presentence Report, advocating the enhancement and citing *Canada*, *supra*. The Trial Court, at sentencing, overruled Petitioner's objection, and imposed the enhancement.

The Applicant appealed the District Court's decision. In affirming the District Court, the United States Court of Appeals for the Fifth Circuit expressly followed *Canada* and held that continued forwarding of images was the Petitioner's effort to maintain contact with the undercover agent.

II. SEVENTH CIRCUIT

The Seventh Circuit appears to address the issue of "distribution" in *United States v. Black*, 116 F.3d 198 (7th Cir. 1997), *cert. den.*, __ U.S. __, 118 S. Ct. 341, 139 L. Ed. 2d 264 (1997). The Defendant there, charged with

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(Cont'd)
in *United States v. Muick*, 167 F.3d 1162 (7th Cir. 1998) found "distribution" where the defendant admitted that he received money from computer users who downloaded his pornography, and required others to upload pornography before they were allowed to download off the defendant's computer. The Sixth Circuit addressed the issue in *United States v. Hibbler*, 159 F.3d 233 (6th Cir. 1998), *cert. den.*, __ U.S. __, 119 S. Ct. 1278, 143 L. Ed. 2d 372 (1999), following *Canada*, *supra*, when the facts at trial established that defendant traded child pornography for pictures of like kind over the internet. The Second Circuit in *United States v. Lorge*, 166 F.3d 516 (2nd Cir. 1999), *cert. den.*, __ U.S. __, 119 S. Ct. 1372, 143 L. Ed. 2d 531 (1999) likewise followed *Canada*, *supra*, when the evidence showed that the dissemination of the pornography was based solely in exchange for photographs of same. The Eleventh Circuit in *United States v. Garrett*, 190 F.3d 1220 (11th Cir. 1999) followed *Canada*, *supra*, in holding that the transmission of photographs in an effort to seduce the complainant was sufficient "valuable gain" to meet the term of distribution so as to trigger the enhancement.

transmission of child pornography, admitted that he regularly received and occasionally disseminated images via computer depicting children in sexual explicit conduct. The Defendant pled guilty, and the government stipulated that the Defendant did not receive, collect or distribute child pornography for commercial purposes or monetary gain and that he did not trade child pornography on a numerically equal basis with other individuals. The government sought the five level increase pursuant to U.S.S.G. § 2G2.2(b)(2), which was denied by the District Court because of absence of pecuniary gain. The government appealed. The Seventh Circuit affirmed, holding that any enhancement under the guideline implies a transaction for pecuniary gain, but defined pecuniary gain as a broad concept that did not exclude the possibility of swaps, barter, in kind transactions, or other valuable consideration.

III. EIGHTH CIRCUIT

The Eighth Circuit in *United States v. Horn*, 187 F.3d 781 (8th Cir. 1999) addressed the issue in a case where the Defendant was convicted of possessing child pornography but with sufficient proof that he trafficked in child pornography, therefore setting this guideline calculation under U.S.S.G. § 2G2.2. The Trial Court gave a five level enhancement under U.S.S.G. § 2G2.2(b)(2) and the Defendant appealed arguing that he did not possess the pornographic materials for pecuniary gain, but only for personal viewing, and since the tapes that were transmitted were not transmitted for money, but for like images, that such did not constitute "distribution." Citing *Canada*, *supra*, the Court held that if Congress had intended U.S.S.G. § 2G2.2(b)(2) to apply only to distribution for pecuniary gain, it could have easily said so directly, and that

the purpose of enhancement for distribution was to increase the sentence of those defendants who did not merely receive child pornography but also disseminated it. [Interestingly, the converse was not addressed: That if Congress had intended that a person who received child pornography would get the base offense level, and that if such person then disseminated that material would be eligible for a five level enhancement, they could have said so, rather than define the term "distribution" in terms of pecuniary gain.]

The Eighth Circuit addressed the issue again in *United States v. Imgrund*, 208 F.3d 1070 (8th Cir. 2000), the Defendant was convicted of knowingly transporting child pornography in interstate commerce. The District Court declined to give a five level enhancement under U.S.S.G. § 2G2.2(b)(2) The Defendant appealed his sentence and the Government argued that the District Court erred in holding that the five level enhancement was inapplicable. The Court of Appeals remanded the case because of what it described as ambiguity in the *Horn* decision. However, in remanding the case for reconsideration, the Eighth Circuit instructed the District Court:

> . . . that if the court find that Imgrund's dissemination of the images was achieved without Imgund's understanding that a trade, barter or exchange of images was to be accomplished between himself and the agent, then the court should conclude that the five-level sentencing enhancement is inappropriate for the facts of the case.

IV. NINTH CIRCUIT

The Ninth Circuit has propagated the most thoughtful analysis of U.S.S.G. § 2G2.2(b)(2), in *United States v. Laney*, 189 F.3d 954 (9th Cir. 1999) In *Laney*, the Court agreed with *Black, supra*, in concluding that "distribution" requires an element of pecuniary gain and this element may exist in a criminal transaction even if no cash has changed hands, so long as the offender acted to acquire something of economic value (such as goods or services). The Court specifically noted that Application Note One mentions acts of production, transportation, and possession that are related to distribution for pecuniary gain, while omitting identical acts that are related to delivery for non-pecuniary reasons. The Court held that the most coherent interpretation of U.S.S.G. § 2G2.2 assigns a base level offense ranking to all criminals who send or receive any amount of child pornography for any reason, while visiting a particularly heavy punishment on those who profit from the exploitation of children.

The *Laney* Court had before it, and addressed, the prior decisions enumerated in this Petition for Writ of Certiorari. The *Laney* Court looked to legislative intent in an attempt to resolve the differences between the Circuits that followed the *Black, supra* interpretation and the Circuits that followed the *Canada, supra* interpretation. The Opinion cited Pub. L. No. 105-314, S506, 112 Stat. 2980, 2982, in which Congress stated that it would like the guidelines to include deliveries of child pornography made for non-pecuniary reasons within the definition of "distribution" and directed the Sentencing Commission to review the guidelines relating to the distribution of child pornography and "promulgate such amendments to the . . . Guidelines as

are necessary to clarify that the term 'distribution of pornography' applies to the distribution of pornography — (A) for monetary remuneration; or (B) for a non-pecuniary interest." [Would Congress have sought such a clarification if the definition was clear?] *Laney* stated that until the Sentencing Commission promulgates such amendments, however, we must interpret the Guidelines as currently written, and this includes not interpreting U.S.S.G. § 2G2.2(b)(2) to include non-pecuniary gain purposes for "distribution." The *Laney* Court also noted the testimony of William W. Wilkins, Jr., Chairman of the U.S. Sentencing Commission before the Congressional Committee in February 1991, when he testified in support of a letter to Congress that stated that sentences under U.S.S.G. § 2G2.2 were further increased by at least five levels if the offense involved "for profit" distribution [137 Cong. Rec. H6736-02, H6737 (1991)]. The *Laney* Court agreed that the definition of "distribution" should be broad, but it was not the intent of the Congress or the Sentencing Commission under U.S.S.G. § 2G2.2(b)(2) to include nonpecuniary purposes within that definition.

The *Laney* Court went on to look at the actual language of U.S.S.G. § 2G2.2(b)(2) and the definition of "distribution" set out in the application note to divine legislative intent and resolve the conflicting circuit opinions. The Court, in trying to indulge all logical inferences, held:

> . . . the Seventh Circuit pointed out in *Black*, § 2G2.2(b)(2) "measures the number of levels of an enhancement by the 'retail value of the material,' which implies a transaction for pecuniary gain." *Black*, 116 F.3d at 202.

> The *Lorge*[3] court read the subsection differently, stating that the drafters included this language to ensure that the largest-scale distributors would receive higher sentences "tied to the value of the distributed material, not to modify the meaning of the term 'distribution.' " *Lorge*, 166 F.3d at 519. We are not persuaded that, as the *Lorge* court suggests, the drafters saw a need to distinguish between a commercial pornographer who sells $40,000 worth of material and one who sells $80,000 worth, but not between a person who gives away a magazine and one who markets $40,000 worth of magazines. We treat the plain language of section 2G2.2(b)(2) as evidence of the Guidelines' drafters' belief that a "distribution" enhancement requires a finding of a profit motive. . . .[4]

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3. The Second Circuit in *United States v. Lorge*, 166 F.3d 516 (2nd Cir. 1999), *cert. den.*, __ U.S. __, 119 S. Ct. 1372, 143 L. Ed. 2d 531 (1999) considered the issue of "distribution." The Defendant pled guilty to transmitting child pornography via computer and objected to the five level increase under U.S.S.G. § 2G2.2(b)(2) for the reason that his crime was not committed for pecuniary gain. Evidence showed Defendant exchanged with other individuals digitized photo images of illegal sex acts involving children, sent E-mails offering to trade videos depicting child pornography for photographs of same, and after agreeing with a government agent to exchange child pornography E-mailed "It sounds like we have a deal." The Appellate Court, citing *Canada*, *supra*, held that the definition of distribution was meant to be inclusive of pecuniary gain purposes, but not exclusive of all other purposes, and to the extent that *Black*, *supra*, conflicted with *Canada*, *supra*, they declined to follow *Black* and held that the Defendant's trades for child pornography was distribution within the meaning of the guideline section.

4. *United States v. Laney*, 189 F.3d 954 (9th Cir. 1999).

Legislative intent as gleaned from the Congressional Record supports the logic that a five level enhancement pursuant to U.S.S.G. § 2G2.2(b)(2) should only be applied when there is proof of a profit motive.

V. WHY THE QUESTION PRESENTED IN THIS CASE IS IMPORTANT

While it does not appear that this Court has had an opportunity to examine this issue since the decision in the *Laney* opinion, this Court has declined the invitation to review this conflict in the past. It is clear that most of the cases in which certiorari has been sought there has been evidence of significant monetary compensation for the dissemination of the images, or, an agreement in advance to barter or swap images as a basis for the dissemination. In each of those cases, it appears clear why this court has declined to review the circuit decisions as the exchange of monetary compensation or the agreement to barter appears to fall within the application notes instructions on the definition of the term "distribution."

However, it is submitted that for the first time, as a result of the *Laney*, *supra*, opinion, there is a clear demarcation between the Fifth and Ninth Circuits, and an ambiguous demarcation in the Eight Circuit.

Even in the *Canada* opinion, the Fifth Circuit found that there was evidence of other distribution of pornographic images from the defendant's computer to satisfy the distribution element. In the instant case, petitioner and the undercover officer posing as the 14-year old female named "Katrina" had already entered into an agreement for petitioner to travel from Lubbock, Texas to Tampa, Florida

for the purpose of having sex weeks before any sexually explicit image was sent to "Katrina." There was no evidence of the dissemination of any other images from petitioner's computer to any other individual, nor was there any evidence of any offer to barter or trade the sexually explicit images that were found upon petitioner's computer.

A clear delineation has been established between the Ninth Circuit opinion in *Laney*, *supra*, which requires evidence of a "for profit" dissemination before the five level enhancement for distribution under U.S.S.G. § 2G2.2(b)(2) applies, and the Fifth Circuit, in petitioner's case, where the mere dissemination of a image to the purported minor, even after the agreement that is the gravamen of the offense had been consummated, is a sufficient "enticement" to trigger the five level enhancement for distribution under U.S.S.G. § 2G2.2(b)(2).

The disparate result is that for the exact same conduct [forwarding a computer image of sexually explicit material for the purposes of maintaining the interest of a minor in another state to have sex with the actor] will result in a 30 to 40 month greater sentence than the same act committed by an individual in California.

The court's resolution of this conflict is of vital interest to the bench and the bar.

CONCLUSION

For the reasons set forth above, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

RICHARD ALAN ANDERSON
Of counsel to:
BURLESON, PATE & GIBSON, L.L.P.
Attorney for Petitioner
2414 N. Akard, Suite 700
Dallas, Texas 75201
(214) 871-4900

APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT DATED AND FILED JUNE 23, 2000

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 99-10750

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

ROBERT SCOTT FOWLER,

Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of Texas

Before REAVLEY, SMITH and EMILIO M. GARZA, Circuit Judges.

REAVLEY, Circuit Judge:

Robert Fowler appeals the sentence he received after pleading guilty to interstate transportation of child pornography in violation of 18 U.S.C. § 2252(a)(1). Under his plea agreement Fowler retained the right to raise on appeal the sentencing issues addressed herein. We agree with his second argument and therefore remand this case to the district court for resentencing.

Appendix A

A. *Distribution of Child Pornography*

Fowler first argues that his sentence should not have been enhanced under U.S.S.G. § 2G2.2(b)(2), which increases the defendant's offense level if the offense involved "distribution." Fowler argues that the images he sent to "Katrina," who turned out to be an undercover agent, were not for pecuniary gain. In a case involving similar facts, we held that the enhancement under § 2G2.2(b)(2) is appropriate if the defendant distributed the images "with a purpose of enticing another person to have sex with him." *United States v. Canada*, 110 F.3d 260, 263 (5th Cir. 1997). Fowler urges us to reconsider this holding in *Canada* in light of authority from other circuits. One panel of this court cannot overrule the decision of another panel, *see FDIC v. Dawson*, 4 F.3d 1303, 1307 (5th Cir. 1993), nor are we inclined to seek en banc review of this issue.

Fowler also argues that *Canada* is factually distinguishable because the evidence shows that he had already reached an agreement to meet with Katrina before he sent the images. The district court rejected this argument. Whether the images were sent to entice Katrina presents a factual question, and the district court's factual findings are reviewed only for clear error. *See United States v. Snell*, 152 F.3d 345, 346 (5th Cir. 1998). The district court's finding is not clearly erroneous. Even though the record contains evidence that Katrina had agreed to meet Fowler before he transmitted the images, there was also evidence that Fowler himself considered the agreement highly tentative, and that he sent the images to maintain Katrina's interest in meeting with him and engaging in specific sexual acts.

Appendix A

B. *Material Portraying Sadistic Conduct*

Fowler argues that the district court erred in enhancing his sentence under U.S.S.G. § 2G2.2(b)(3), which provides for an increase in the offense level "[i]f the offense involved material that portrays sadistic or masochistic conduct or other depictions of violence."

The basis of this enhancement is that Fowler's residence was searched and electronic images of sadistic sexual conduct, primarily involving bondage, were recovered. The government claims that two of the images depict minors. According to the government's sentencing memorandum the two images of minors had 1996 dates on directories to the floppy disks where they were found. Fowler does not dispute that some of the images portray sadistic conduct or other depictions of violence under the guideline. His argument is that he pleaded guilty to one count of sending an image to Katrina, and that these other, sadistic images found in his home were not sent to Katrina or any other party. He also argues that there was no expert testimony supporting the government's position that some of the images were of minors.

Even if the government correctly argues that the record supports a finding that some of the images portraying sadistic conduct were of minors, we agree with Fowler that the possession of these images should not have resulted in an enhanced sentence under § 2G2.2(b)(3).

The image Fowler electronically mailed which was the basis of the count of conviction did not depict sadistic conduct. It was sent on October 28, 1998, after Katrina and Fowler met on the Internet and Katrina asked Fowler if he

had any more of "those" pictures. The issue presented is whether the possession of the sadistic images is "relevant conduct" under the guidelines, in circumstances where (1) the defendant pleaded guilty to transporting an image of child pornography, and (2) other images, including two images of minors, which were not transported but were merely possessed by the defendant, depicted sadistic conduct.

The guidelines provide that in calculating the offense level the district court may consider acts in addition to the acts underlying the offense of conviction so long as those other acts constitute "relevant conduct" as defined in the guidelines. Under U.S.S.G. § 1B1.3(a)(1), the base offense level and adjustments thereto shall be determined on the basis of "all acts and omissions committed, aided, abetted, counseled, commanded, induced, procured, or willfully caused by the defendant . . . that occurred during the commission of the offense of conviction, in preparation for that offense, or in the course of attempting to avoid detection or responsibility for that offense." Under this guideline, the receipt or possession of the sadistic images would not constitute relevant conduct. Fowler pleaded guilty to one act of transporting and shipping on October 28, 1998 an image depicting sexual activity of a minor. The electronic mailing of the image that was the basis of the count of conviction occurred at a discrete moment, and Fowler's receipt of the other, sadistic images did not occur "during the commission of the offense of conviction." Further, there was no proof that the sadistic images were part of preparing for the offense of conviction or avoiding detection of the crime. On the contrary, the government's sentencing memorandum indicates that the images that Fowler sent to Katrina, whom Fowler thought was a sexually inexperienced

minor, were part of his efforts to entice Katrina to meet with him and to engage in certain non-violent sexual acts. There is no indication in the record that Fowler thought of sending the sadistic images to Katrina or anyone else. The record indicates if anything that Fowler refrained from sending such images because he believed they would only have impaired his efforts to entice Katrina.

The guidelines further provide that relevant conduct may include acts committed by the defendant "that were part of the same course of conduct or common scheme or plan as the offense of conviction." U.S.S.G. § 1B1.3(a)(2). "Common scheme or plan" is defined as two or more offenses that are "substantially connected to each other by at least one common factor, such as common victims, common accomplices, common purpose, or similar *modus operandi*." *Id.* § 1B1.3 n.9(A). Again, the record does not reflect that the possession of the sadistic images were part of Fowler's plan to entice Katrina. An equally if not more plausible scenario is that Fowler deliberately refrained from sending these images to Katrina, for fear that they would dissuade her from meeting him in person.

"Same course of conduct" is defined as follows: "Offenses that do not qualify as part of a common scheme or plan may nonetheless qualify as part of the same course of conduct if they are sufficiently connected or related to each other as to warrant the conclusion that they are part of a single episode, spree, or ongoing series of offenses." *Id.* § 1B1.3 n.9(B). Factors to consider in making this determination include "the degree of similarity of the offenses, the regularity (repetitions) of the offenses, and the time interval between the offenses." *Id.*

Appendix A

Evidence submitted with the government's sentencing memorandum indicates dates for the sadistic images running sporadically from 1993 through 1998. According to the government, two of the images with 1996 dates depicted minors. Fowler's communications with Katrina did not begin until December 1997. The government did not show that Fowler's receipt of the images depicting sadistic conduct were part of the plan to entice Katrina that led to the offense of conviction or any similar plan. In our view, the receipt of the sadistic images and the transmission of the non-sadistic image were not sufficiently related to conclude that they were part of the same course of conduct.

The dissent would make the possession of any child pornography a part of the offense of the interstate transportation of child pornography. We do not believe the guidelines should be construed so broadly.[1]

Because we conclude that the enhancement under § 2G2.2(b)(3) was unwarranted, we vacate the sentence and remand this case to the district court for resentencing.

VACATED and REMANDED.

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1. The Seventh Circuit in *United States v. Ellison*, 113 F.3d 77 (7th Cir. 1997), found a relevant relation between the possession of sadomasochistic magazines and the receipt of child pornography because the defendant admitted using the magazines to keep him from seeking out boys. *Id.* at 83 n.8. Both the videotape received and the magazines possessed were used the same way — as a substitute for live victims. Fowler, on the other hand, committed the crime of conviction to entice a live victim, a purpose entirely remote from the possession of sadistic images.

Appendix A

EMILIO M. GARZA, Circuit Judge, concurring in part and dissenting in part:

Robert Scott Fowler pled guilty to a single count of interstate transportation of child pornography. *See* 18 U.S.C. § 2252(a)(1). The district court sentenced him to eighty-seven months incarceration after applying two enhancements to his sentence which he challenges on appeal. I agree with the majority that the district court properly enhanced his sentence because his offense involved "distribution." *See* United States Sentencing Commission, *Guidelines Manual*, § 2G2.2(b)(2) (1998). However, I disagree with the majority's view that Fowler's sentence should not have been enhanced under Sentencing Guideline § 2G2.2(b)(3) for possessing sadistic material. Accordingly, I dissent in part.

Fowler was convicted after he transported child pornography to "Katrina," a detective in the Hillsborough County Sheriff's Office in Tampa, Florida who Fowler thought was a fourteen-year-old girl. He sent the images to her to induce her to have sex with him. He was arrested at a hotel after he flew to Tampa to meet with her.

Fowler consented to have his residence searched. Government agents found seventy-six pornographic and sadistic images on his computer equipment, two of which they argued involved minors.

Section 2G2.2(b)(3) allows a four-level enhancement "[i]f the offense involved material that portrays sadistic or masochistic conduct or other depictions of violence." "Offense" is broadly defined to include "the offense of

conviction and all relevant conduct under § 1B1.3." USSG § 1B1.1 comment. (n.1(l)).[1] "Relevant conduct" is in turn defined as "all acts and omissions committed, aided, abetted, counseled, commanded, induced, procured, or willfully caused by the defendant . . . that occurred during the commission of the offense of conviction, in preparation for that offense, or in the course of attempting to avoid detection or responsibility for that offense . . . ." USSG § 1B1.3(a).

The district court applied the § 2G2.2(b)(3) enhancement after concluding that Fowler's possession of two sadistic images depicting minors[2] was "relevant conduct" to his

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1. By contrast, § 2G2.2(b)(1) requires an enhancement "[i]f the material involved a prepubescent minor or a minor under the age of twelve years." USSG § 2G2.2(b)(1). This enhancement's requirement that "the material" involve a prepubescent minor indicates a broader scope for § 2G2.2(b)(3), which applies when "the offense involved" sadistic material. *Id.* § 2G2.2(b)(3).

2. Fowler argues in passing that the government failed to show that the two images depicted minors. He did not object to the enhancement on this grounds below, and thus we review this argument for plain error. *See United States v. Cabral-Castillo*, 35 F.3d 182, 188-89 (5th Cir. 1994).

A sentencing court may rely on evidence so long as it has sufficient indicia of reliability, which includes being stated in the PSR. *See United States v. Vital*, 68 F.3d 114, 120 (5th Cir. 1995) ("A presentence report is considered reliable and may be considered as evidence by the trial judge in making sentencing determinations."). The PSR stated that the images were sadistic and that two of the images involved minors. Additionally, the government submitted

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distribution offense. We review this finding only for clear error, *see United States v. Wall*, 180 F.3d 641, 644 (5th Cir. 1999) ("A district court's determination of what constitutes relevant conduct for purposes of sentencing is reviewed for clear error."), and I cannot agree with the majority that the court's finding was clearly erroneous.

Fowler's possession of the sadistic images is proscribed by the same criminal statute as his distribution conviction, *see* 18 U.S.C. § 2252(a)(1) (punishing knowing transportation); *id.* § 2252(a)(4) (punishing knowing possession), and it was literally an "act[ ] committed . . . by the defendant . . . that occurred during the commission of the offense of conviction," USSG § 1B1.3(a). In this respect, the enhancement here fits within § 2G2.2(b)(3)'s clear intent to punish all relevant uncharged conduct. Thus, the court properly found that Fowler's possession of sadistic child pornography was relevant conduct to his transportation offense.

The majority concludes to the contrary by defining Fowler's "offense" narrowly. The majority implies that,

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copies of the two images. Because Fowler did nothing (and, indeed, still has done nothing) to rebut the PSR's statement that the images involved minors, the court properly treated them as involving minors. *See United States v. Lowder*, 148 F.3d 548, 552 (5th Cir. 1998) ("Mere objections [to the PSR] do not suffice as competent rebuttal evidence."); *Vital*, 68 F.3d at 120 ("Vital failed to present any evidence to support his objection to the court's reliance on the information set forward in the PSR pertaining to August's testimony. Consequently, the district court's reliance on the PSR was not clearly erroneous.").

because Fowler received the sadistic images two years before he committed the offense conduct, Fowler's receipt of the images cannot be "relevant conduct" to the offense to which he pled guilty. This view of Fowler's relevant conduct ignores the fact that, although he received the images two years before he committed the instant offense, he continued to possess them up to and during the time of the offense. His continued possession of the sadistic images — itself prohibited by statute — was thus "relevant conduct" to his violation of another part of the same child pornography statute.

The majority cites no cases which support its narrow view of "relevant conduct."[3] Instead, the only case to have addressed this issue contradicts the majority's view. In *United States v. Ellison*, 113 F.3d 77 (7th Cir. 1997), the defendant was convicted of receiving child pornography and his sentence was enhanced based on magazines found in his house containing sadistic pictures of boys. The Seventh Circuit upheld the enhancement because "[d]uring the commission of the crime of Ellison's conviction — receipt of the pornographic videotape — Ellison was committing another crime: possession of child pornographic magazines, a crime punishable under 18 U.S.C. § 2252(a)(4)." *Id.* at 83. The court concluded that, "[f]ar from being unrelated, both Ellison's receipt and his possession of child pornographic materials violate the same criminal statute and indicate his

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3. Although we have not addressed the question presented here, we have uniformly upheld application of the § 2G2.2(b)(3) enhancement. *See, e.g.*, *United States v. Canada*, 110 F.3d 260 (5th Cir. 1997); *United States v. Kimbrough*, 69 F.3d 723 (5th Cir. 1995).

dangerous propensities in the realm of sexual exploitation of minors." *Id.* In reaching this conclusion, the court specifically rejected the defendant's contention, accepted by the majority here, that his sentence could not be enhanced for the magazines because he had received them twenty years earlier.[4] *See id.* at 83 n.8 ("Ellison seems to make an argument that because he acquired the magazines some twenty years ago (when receipt and ownership of this pornography was legal), they are too temporally remote to be considered relevant conduct. The temporal relevance of the magazines, however, is unrelated to when and how he acquired them; they are relevant because he illegally possessed them (and, he admitted, 'used' them to keep him from seeking out boys) contemporaneously with his crime of receipt.").[5]

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4. The First Circuit has reached a similar conclusion in allowing the enhancement based on sadistic images involving only adults. *See United States v. Schultz*, 970 F.2d 960, 962-63 (1st Cir. 1992). Even though the child pornography in *Schultz* did not involve sadistic images, the First Circuit held that the enhancement was proper because the defendant also distributed adult pornography involving sadistic images. Noting that the Sentencing Guidelines "counsel[ ] a broad interpretation of the term 'offense,' " the First Circuit held that the enhancement was proper because "[t]he sale of the 'CESC' videotape depicting adult sadomasochism was properly considered 'relevant conduct' for which Schultz was 'otherwise accountable.' " *Id.* at 963.

5. The majority relies on this footnote to argue that *Ellison* is distinguishable. Under the majority's view, *Ellison* only held that the possession of sadistic child pornography was relevant conduct to the receipt of other child pornography because the defendant used both types of pornography in "the same way — as a substitute for

(Cont'd)

Appendix A

The Seventh Circuit's reasoning in *Ellison* is correct. A defendant's possession of sadistic child pornography is clearly "relevant conduct" to that defendant's simultaneous transmission of child pornography. Because the majority erroneously concludes to the contrary, I dissent.

(Cont'd)
live victims." The majority premises this view on the parenthetical language in the footnote about the defendant's use of the materials "to keep him from seeking out boys." *Id.* As is clear from the rest of the footnote and the opinion, this parenthetical language only bolstered the court's otherwise-sufficient reasoning: that contemporaneous possession of child pornography is relevant conduct to another child pornography offense because both types of conduct violate the same criminal statute and both indicate the same "dangerous propensities in the realm of sexual exploitation of minors." *Id.* at 83. This same basic reasoning justifies the enhancement here.

APPENDIX B — AMENDED JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, LUBBOCK DIVISION DATED AND FILED JULY 1, 1999

United States District Court
Northern District of Texas
Lubbock Division

Case Number: 5:98-CR-0150-01-C

UNITED STATES OF AMERICA

v.

ROBERT SCOTT FOWLER

Defendant.

AMENDED JUDGMENT IN A CRIMINAL CASE
(For Offenses Committed On or After November 1, 1987)

DATE OF ORIGINAL JUDGMENT: June 18, 1999

***REASON FOR AMENDMENT:** To correct Social Security number

The defendant, ROBERT SCOTT FOWLER, was represented by Dan Hurley.

On motion of the United States, the court has dismissed the remaining counts of the indictment as to this defendant.

Appendix B

The defendant pleaded guilty to count 3 of the indictment filed on 12/08/98. Accordingly, the defendant is adjudged guilty of such count, involving the following offense:

Title & Section	Nature of Offense	Date of Offense	Count Number
18 USC § 2252(a)(1)	Interstate Transportation of Child Pornography	10/28/98	3

As pronounced on 07/01/99, the defendant is sentenced as provided in pages 1 through 5 of this Judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

It is ordered that the defendant shall pay to the United States a special assessment of $100.00, for count 3, which shall be due immediately. Said special assessment shall be made to the Clerk, U.S. District Court.

It is further ordered that the defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this Judgment are fully paid.

Signed this 1st day of July, 1999.

s/ Sam R. Cummings
SAM R. CUMMINGS
UNITED STATES DISTRICT JUDGE

Appendix B

Defendant's SSN: 467-39-5625
Defendant's Date of Birth: 09/09/61
Defendant's Address: 2514 58th Street, Lubbock, TX 79413
Defendant's USM No: 38158-018

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of 87 months.

The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons on or before 2:00 PM, July 9, 1999.

* * *

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of 3 years.

The defendant shall report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state, or local crime.

The defendant shall not illegally possess a controlled substance.

Appendix B

For offenses committed on or after September 13, 1994:

The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as directed by the probation officer.

* * *

☒ The defendant shall not possess a firearm as defined in 18 U.S.C. § 921. (Check, if applicable)

If this judgment imposes a fine or a restitution obligation, it shall be a condition of supervised release that the defendant pay any such fine or restitution that remains unpaid at the commencement of the term of supervised release in accordance with the Fine and Restitution sheet of the judgment.

The defendant shall comply with the standard conditions that have been adopted by this court (set forth below). The defendant shall also comply with the additional conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

1) The defendant shall not leave the judicial district without the permission of the court or probation officer.

2) The defendant shall report to the probation officer as directed by the court or probation officer and shall

submit a truthful and complete written report within the first five days of each month.

3) The defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer.

4) The defendant shall support his or her dependents and meet other family responsibilities.

5) The defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons.

6) The defendant shall notify the probation officer 10 days prior to any change in residence or employment.

7) The defendant shall refrain from excessive use of alcohol.

8) The defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered.

9) The defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer.

10) The defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer.

Appendix B

11) The defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer.

12) The defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court.

13) As directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

SPECIAL CONDITIONS OF SUPERVISION

While the defendant is on supervised release pursuant to this Judgment:

1. The defendant shall participate in mental health treatment services as directed by the probation officer until successfully discharged. These services may include prescribed medications by a licensed physician. The defendant is further ordered to contribute to the costs of services rendered in an amount to be determined by the probation officer, based on ability to pay or availability of third-party payment.

Appendix B

2. Should the determination be made by a mental health official that the defendant needs to participate in a sex offender treatment program:

> The defendant shall participate in sex offender treatment services as directed by the probation officer until successfully discharged. These services may include psycho-physiological testing to monitor the defendant's compliance, treatment progress, and risk to the community. The defendant is further ordered to contribute to the costs of services rendered in an amount to be determined by the probation officer, based on ability to pay or availability of third-party payment.

3. While on supervised release, the defendant shall not possess a computer or modem and/or seek employment which requires the defendant to use a computer without prior permission of the probation officer.

4. The defendant shall not frequent any location and/or activity where minors under the age of 18 would congregate, and shall have no form of unsupervised contact with minors under the age of 18 without prior permission of the probation officer.

5. The defendant shall neither possess nor have under his/her control any pornographic matter, or any matter that sexually depicts minors under the age of 18. This includes, but is not limited to, matter obtained through access to any computer, and any matter linked to computer access or use.

Appendix B

6. The defendant shall neither seek nor maintain employment or volunteer work at any location and/or activity where minors under the age of 18 would congregate without prior permission of the probation officer.

STATEMENT OF REASONS

The court adopts the factual findings and guideline application in the presentence report.

Guideline Range Determined by the Court:

Total Offense Level:	27
Criminal History Category:	I
Imprisonment Range:	70 months to 87 months.
Supervised Release Range:	2 to 3 years
Fine Range:	$ 12,500.00 to $ 125,000.00
Restitution:	$ N/A

The fine is waived because of the defendant's inability to pay.

The sentence is within the guideline range, that range does not exceed 24 months, and the court finds no reason to depart from the sentence called for by the application of the guidelines.